

Matthew J. Stock
Direct Dial: 206.957.5955
Email: mstock@jzplaw.com

September 18, 2020

VIA E-MAIL

David Askman
The Askman Law Firm, LLC
1543 Champa Street, Suite 400
Denver, CO 80202
dave@askmanlaw.com

**Re: Portland Harbor Superfund Site
River Mile 7 West Arkema Project Area
Funding Agreement for Tribal Response Costs**

Dear David:

On behalf of Legacy Site Services LLC, agent for Arkema Inc., I am writing in response to your September 15, 2020 letter. Under the terms of the Administrative Settlement Agreement and Order on Consent for Remedial Design at River Mile 7 West Project Area, CERCLA Docket No. 10-2020-0054 (the “Order”), Arkema is “responsible for funding Tribal Response Costs incurred pursuant to this Settlement that are not inconsistent with the NCP.” Order at ¶ 40(a). The draft funding agreements that I provided you on July 2 and July 30, 2020 (the “Funding Agreement”) satisfies that obligation.

The Yakama Nation has rejected the Funding Agreement, claiming that the process by which the Yakama Nation would be expected to prepare estimated response cost budgets for any given fiscal year—an initial meeting to discuss anticipated work for the year in question, followed by preparation of an initial budget estimate (with a reasonable contingency) identifying the costs to be incurred by the tribe and its technical consultants along with a description of the underlying tasks to be completed, followed by a reconciliation process, in which the prior year’s expenditures (supported by cost documentation) are compared to that year’s budget so that the parties can account for any shortfall or carryover in funds in the final budget request—is overly burdensome and would preclude the possibility of payment before the Yakama Nation’s response costs for any given year are incurred. This is not accurate.

As a preliminary matter, there is nothing in the Order (or CERCLA) that requires Arkema to fund the Yakama Nation's response costs before those costs are incurred. Arkema has offered the process set forth in the Funding Agreement as a courtesy to your client.

Moreover, the Yakama Nation's concern that the process set forth in the Funding Agreement—a process functionally equivalent to the processes that Arkema and the Yakama Nation utilized in relation to Arkema's Administrative Order on Consent for Removal Action (CERCLA Docket No. 10-2005-0191) and the Lower Willamette Group's Administrative Order on Consent for Remedial Investigation and Feasibility Study (CERCLA Docket No. 10-2001-0240)—would preclude advance funding is overstated.¹ Under the terms of the Funding Agreement, Arkema would be required to fund the Yakama Nation's anticipated response costs within 45 days of the Yakama Nation's preparation of a final budget request. While the Funding Agreement sets forth deadlines by which the Yakama Nation would need to complete the various steps leading up to that budget request, there is nothing in the Funding Agreement that prevents the Yakama Nation from completing those steps prior to those deadlines. In other words, if the Yakama Nation wants to obtain funding before it incurs significant response costs for any given fiscal year, then all it has to do is accelerate its development of the final budget request.

The Yakama Nation's proposed revisions to the Funding Agreement eliminate Arkema's ability to meaningfully vet the Yakama Nation's estimated response costs. Under the terms proposed by the Yakama Nation, Arkema would be expected to provide funding for fiscal years 2020 and 2021 with no budget whatsoever and no supporting documentation. For fiscal year 2022 and beyond, the Yakama Nation would be required to prepare and provide Arkema with an estimated annual budget, but the Yakama Nation would not be obligated to provide any meaningful detail for the costs to be incurred. Furthermore, under the Yakama Nation's proposal, there is no obligation to provide the timesheets substantiating the previous year's response cost expenditures. While the Yakama Nation's proposed process may reduce its administrative costs associated with annual budget requests, it unreasonably denies Arkema the ability to review and verify the response costs that it is being asked to fund.² Arkema is neither willing nor obligated to enter into such an agreement.

Arkema remains prepared to sign a funding agreement with the Yakama Nation to cover the response costs that the tribe reasonably incurs in relation to the Arkema Project Area, as it has already done with the Confederated Tribes of the Grand Ronde Community of Oregon, the Nez Perce Tribe, the Confederated Tribes of Siletz Indians, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes of the Warm Springs Reservation of Oregon. But

¹ This concern also appears to be manufactured. To date, Arkema has made repeated requests for the Yakama Nation's annual budget for fiscal year 2020—a fiscal year that ends in less than two weeks. Despite these repeated requests, the Yakama Nation has yet to provide us with any indication of the response costs that it has incurred to date in relation to the Arkema Project Area.

² Additionally, the Yakama Nation's concerns over administrative costs are unwarranted as Arkema is ultimately obligated under the terms of the Order to reimburse your client for the costs of preparing annual budgets.

David Askman
September 18, 2020
Page 3

that agreement must contain the reasonable budget development process that Arkema has proposed.

If you have any questions, please contact me. Otherwise, we look forward to completing these negotiations and working with the Yakama Nation on response cost budgets for the upcoming fiscal years.

Sincerely,

JOYCE ZIKER PARTNERS, PLLC



Matthew J. Stock

cc: Client (via e-mail)
Tom Zeilman (via e-mail)
Stephanie Ebright (via e-mail)